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Supreme Court of the United States

OCTOBER TERM, 1948

No. 51

RAILWAY EXPRESS AGENCY, INC., CHARLES GERCHARIO, MICHAEL LONG, et al.,

Appellants,

against

PEOPLE OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLEE'S BRIEF

November 26, 1948.

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APPELLEE'S BRIEF

Statement

This is an appeal from a final judgment of the New York Court of Appeals (R. 107-110; 297 N. Y. 703, 77 N. E. 2d 13) affirming judgments of the Appellate Part of the Court of Special Sessions of the City of New York (R. 79-82; 188 Misc. 342, 67 N. Y. S. 2d 732) which affirmed judgments of the New York City Magistrates' Court convicting the appellants of operating or causing to be operated advertising vehicles on the streets of the City of New York (R. 6-32; Traffic Regulations of the City of New York, Art. 9, § 124). This appeal was allowed by the Chief Judge of the Court of Appeals (R. 121-122). On June 21, 1948, this Court noted probable jurisdiction (R. 141).

Facts

The facts may be summarized briefly. In both cases trucks of the Railway Express Agency, while carrying merchandise in the regular course of the company's delivery business, bore advertising signs on their outer sides (R. 39-42, 72-74, 91-96). These consisted of posters or placards four feet square or larger which advertised, among other things, Camel cigarettes, Ringling Brothers and Barnum & Bailey Circus, radio station WOR, Prince Albert Smoking Tobacco, and various motion pictures (R. 40-42, 72,74, 91-96). These signs are portrayed in the exhibits at pages 91 to 96 of the Record, but the photographs do not show the attractive colors of the actual advertisements (R. 42).

The appellants other than Railway Express Agency were employees of that company and were engaged in their employment as drivers of trucks when they were served with summonses for violating Traffic Regulation § 124 (R. 72-73).

The Railway Express Agency operates approximately 1900 trucks in New York City (R. 52-54). These trucks do not leave New York City except to go to rail heads at Communipaw, Erie, Lackawanna and West Shore on the New Jersey side of the Hudson River (R. 48, 54).

The advertising signs are carried on the trucks pursuant to a contract with the Douglas Leigh advertising company (R. 61-63, 106).

Traffic Regulation Involved

The Traffic Regulation involved was adopted by the Police Commissioner under the authority granted to him by Section 435 of the New York City Charter. The Charter provision, in so far as pertinent, reads as follows:

"The police department and force shall have the power and it shall be their duty to * * * regulate, direct, control and restrict the movement of vehicular and pedestrian traffic for the facilitation of traffic and the convenience of the public as well as the proper protection of human life and health; * * * The commissioner shall make such rules and regulations for the conduct of pedestrian and vehicular traffic in the use of the public streets, square and avenues as he may deem necessary * * *."

The Traffic Regulation reads:

"**§ 124. Advertising vehicles.**

No person shall operate, or cause to be operated, in or upon any street an advertising vehicle; provided that nothing herein contained shall prevent the putting of business notices upon business delivery vehicles, so long as such vehicles are engaged in the usual business or regular work of the owner and not used merely or mainly for advertising."

Background of the Regulation

Traffic Regulation § 124 stems from an ordinance originally enacted in 1882 and is the same as that ordinance except for slight and unimportant revisions. The ordinance continued in effect until the end of the year 1937. At that time the statute enacting the Administrative Code of the City of New York repealed this ordinance along with many other ordinances and statutes.

In accordance with the recommendations of the codifiers who prepared the Administrative Code this section, together with all but one of the other traffic regulations contained in the Code of Ordinances, was not re-enacted, but they were immediately adopted as Traffic Regulations by the Police Commissioner of the City of New York pursuant to the authority granted him by § 435 of the New York City Charter.

Opinions Below

The Court of Appeals affirmed without opinion aside from a dissent of one sentence by three judges (R. 107-108). Its memorandum of affirmance is reported in 297 N. Y. 703 (1947).

The Appellate Part of Special Sessions, in affirming the convictions, wrote a *Per Curiam* opinion (R. 82-85). It pointed out that the meaning of the Traffic Regulation involved was governed by *Fifth Avenue Coach Co.* v. *City of New York*, 194 N. Y. 19 (1909) and stated that the Police Commissioner had the power to adopt the Regulation since the New York City Charter gives him power to regulate matters relating to traffic control. The Court said (R. 85):

> "It cannot be doubted that advertising on vehicles daily using the streets of the city do constitute a distraction to vehicle drivers as well as the pedestrian public and do affect the safety of the public in the use of the streets."

This opinion is reported in 188 Misc. 342 (1947).

Issues

Three issues are raised by this appeal:

1. Is a traffic regulation prohibiting the operation of advertising vehicles on the streets of the City of New York, in so far as it is applicable to vehicles not used merely for that purpose, so lacking in reasonable justification as to violate the due process clause of the Fourteenth Amendment?

2. Does a provision in such a traffic regulation exempting from its application vehicles bearing "business notices" of the owner so long as such vehicles are engaged

in the usual business or regular work of the owner, involve a classification so lacking in reasonable justification as to violate the equal protection of the laws clause of the Fourteenth Amendment?

3. Does the application of such a traffic regulation to trucks engaged in interstate commerce impose such a burden on interstate commerce as to violate the commerce clause of the Constitution?

Summary of Argument

In the case of *Fifth Avenue Coach Co.* v. *City of New York*, 221 U. S. 467 (1911), this Court sustained the constitutionality of a predecessor ordinance to the present Traffic Regulation. All the constitutional issues now raised, aside from the commerce clause issue, were passed on in that case.

1. Entirely aside from the precedent of the *Fifth Avenue Coach* case, it is beyond dispute that a State (or a City or an appropriate public officer to whom the State's power has been delegated) may enact legislation reasonably designed to prevent traffic accidents or traffic congestion. A conclusion that advertising signs on the sides of vehicles are likely to distract pedestrians or motorists and divert their attention from vehicular traffic so as to cause or create danger of causing traffic accidents in the congested traffic of a city such as New York, cannot be said to be without reasonable basis.

Advertising signs are designed to attract and divert attention. Unless the view of advertisers that advertising signs accomplish this purpose is entirely lacking in reason, the Traffic Regulation involved rests upon sound grounds for the exercise of the police power. Clearly, advertising signs on the sides of trucks divert attention, and the conclusion that such diversion of attention in the concen-

trated traffic of New York City creates danger of accidents has, particularly when the conclusion is reached by one expert in traffic matters, a reasonable basis.

2. The exception in the Traffic Regulation for business notices of the owner of the vehicle does not result in a denial of the equal protection of the laws. It is based upon a reasonable classification. Many regulations, including regulations of billboards and the usage of highways, contain exceptions relating to the business of the owner. Owners of vehicles generally do not advertise their business on the sides of their vehicles. Moreover, it is doubtful whether the exception for "business notices" will be construed to permit the use of a regular advertising sign as contrasted with a mere statement of name, address, and nature of business.

3. Traffic safety regulations of states and municipalities do not violate the commerce clause merely because they are applicable to interstate vehicles along with all others. A regulation against the use of advertising signs on vehicles does not, particularly in its application to trucks that are confined to New York City except for trips to rail heads on the New Jersey side of the Hudson River, impose an improper burden on interstate commerce.

POINT I

A regulation barring the use of advertising signs on the outer sides of vehicles plying the streets of New York City is designed to promote public safety and is a valid exercise of the police power.

(1)

At the outset we wish to point out that the appellants have failed to establish a basis for invoking the due process clause in that neither life nor liberty nor property is taken

away by the traffic regulation under attack. Obviously the appellants' claim is that they are being deprived of their property without due process of law. Analysis reveals, however, that no property right is being infringed.

The regulation limits the opportunity to use public streets or highways to the extent that it forbids the use of the streets to vehicles so long as they carry advertising signs. The primary question then is whether there is a right in the nature of property to use the public highways for the purpose of advertising, whether or not that purpose is the sole reason for the vehicle being on the streets or is merely secondary to other uses in the ordinary course of business.

The basic problem was posed in the case of *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), where this Court said (pp. 54-55):

> "We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfilment of the public use to which streets are dedicated."

The Court went on to uphold the municipal ordinance in so far as it banned the distribution of commercial advertising material on the streets.

See also: *Kelbro* v. *Myrick*, 113 Vt. 64, 30 A. 2d 527 (1943).

In *Stephenson* v. *Binford*, 287 U. S. 251 (1932), the law regarding the right to regulate the use of highways was summarized as follows (p. 264):

"It is well established law that the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit."

See also: *Packard* v. *Banton*, 264 U. S. 140 (1924); *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177 (1938); *People* v. *Rosenheimer*, 209 N. Y. 115, 120-121, 102 N. E. 530 (1913); *Gill* v. *City of Dallas*, 209 S. W. 209 (Tex. Civ. App., 1919), app. dism. 252 U. S. 588 (1920).

It has generally been held that a municipality cannot even grant the right to use its streets for advertising purposes. *State ex rel. Belt* v. *St. Louis*, 161 Mo. 371, 61 S. W. 658 (1901); *City of Birmingham* v. *Holt*, 239 Ala. 248, 194 So. 538 (1940); *People ex rel. Healy* v. *Clean Street Co.*, 225 Ill. 470, 80 N. E. 298 (1907); *State ex rel. Beck* v. *City of Hutchinson*, 144 Kan. 700, 62 P. 2d 865 (1936); *Maupin* v. *City of Louisville*, 284 Ky. 195, 144 S. W. 2d 237 (1940).

It would seem indisputable that there is no property right to use the public streets for the purpose of private and commercial advertising. The fact that the advertising use does not add to the number of vehicles plying the streets but is incidental to other and permitted uses, does not transmute it into a property right.

(2)

Assuming, for the purpose of argument, that a property right is involved, the regulation, nevertheless, should be upheld. It constitutes a valid exercise of the police power.

Beyond dispute the police power covers traffic regulation. The due process attack must rest on the contention that a regulation barring the use of advertising signs on the outer sides of vehicles plying the streets of the City of New York is without a rational basis.

Such a regulation, however, is plainly intended to promote traffic safety. Advertising signs are designed to attract attention and to be read. To the extent that they achieve their aim, they distract. The temptation to read an advertising sign on the side of a vehicle is not confined to those on the sidewalks. It may arise in a pedestrian crossing a street or in the driver of another vehicle. In the congested traffic of New York City the diversion of attention, even momentarily, of a motorist from the driving of a vehicle or of a pedestrian from the avoidance of vehicles may lead to an accident. Certainly the conclusion that such advertisements may distract attention and cause accidents does not pass the bounds of reason.

The Courts have recognized that advertising signs may cause traffic hazards. In *Perlmutter* v. *Greene*, 259 N. Y. 327, 331, 333-334; 182 N. E. 5 (1932), it was held that the State may screen off the view of billboard advertising signs at dangerous curves in roads where such signs might distract the attention of automobile drivers. In *General Outdoor Advertising Co.* v. *Department of Public Works*, 289 Mass. 149, 181, 193 N. E. 799 (1935), app. dism. 296 U. S. 543 (1935), 297 U. S. 725 (1936), the Court, in sustaining the billboard regulations involved, pointed out that the regulations tended to prevent the distraction of the attention of drivers of automobiles and to promote public safety upon the highways.

To the same effect, see: *Hav-A-Tampa Cigar Co.* v. *Johnson*, 149 Fla. 148, 161-162, 5 So. 2d 433, 438 (1941); *Swisher & Son* v. *Johnson*, 149 Fla. 132, 145, 5 So. 2d 441, 446 (1941).*

(3)

A predecessor ordinance to the present traffic regulation was reviewed by this Court in *Fifth Avenue Coach Co.* v. *City of New York*, 221 U. S. 467 (1911). The New

* See, also, the statement of the New York City Planning Commission, quoted *infra* at p. 13.

York Court of Appeals had sustained the validity of the ordinance on the ground that advertising signs on the sides of vehicles might tend to cause crowds to collect and thus interfere with the use of the sidewalks (194 N. Y. at p. 30). This Court apparently adopted the same basis for upholding the ordinance as an exercise of the police power (221 U. S. at pp. 481-483). Even if there were less likelihood that today the signs would distract and thereby create danger of accidents than there was that in 1911 the signs would cause crowds to collect, the more serious results of such a consequence would justify this exercise of the police power.

The appellants' suggestion that the public has become so surfeited with advertising that its power to attract or distract can no longer be said to be a public danger is disingenuous. Unless the Railway Express Agency is obtaining income through its advertising trucks under false pretenses, advertising signs still have power to attract attention.

The public may well be annoyed by advertising, but it still tends to be distracted by it. While the novelty may have worn off, the ability of advertising signs to attract attention is indicated by their widespread use. The dangers of distraction in traffic have been multiplied, not diminished, by the tremendous increase in vehicular traffic.

Our view of the effect of the advertising signs may be clarified by a few theoretical and perhaps exaggerated examples of advertising vehicles. Suppose a truck carried on its sides advertising signs displaying a reproduction of a nude by Rubens, or the scantily-clad female paintings of Petty or Vargas. Suppose a truck carried on its sides an advertising message conveyed by means of electric bulbs which flash off and on, illuminating letters and words, similar to the news flashes on the Times Building in New York City. There can be no doubt that such signs would tend to divert attention and create danger of accidents. Less attractive signs, such as those on the sides of the Railway Express trucks, may not attract attention to the

same degree, but the view that their ability to distract creates danger of accidents in New York City is far from capricious.

The applicability of the Traffic Regulation is not confined to the trucks of the Railway Express Agency. If the Regulation is invalidated, the many other trucking companies in New York City will be enabled to carry advertising signs without restriction as to the nature of the signs.

(4)

To sustain the validity of the Traffic Regulation it is not necessary to submit evidence of accidents that have been caused by the advertising signs. Where underlying questions of fact may determine constitutionality, the presumption of constitutionality prevails in the absence of a factual foundation in the record for overthrowing the law or regulation. *O'Gorman & Young* v. *Hartford Fire Ins. Co.*, 282 U. S. 251, 257-258 (1931); *Williams* v. *Mayor*, 289 U. S. 36, 42 (1933); *Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 185-186 (1935); *Sullivan* v. *City of Shreveport*, 251 U. S. 169 (1919).

In *General Outdoor Advertising Co.* v. *Dept. of Public Works*, 289 Mass. 149, 181, 193 N. E. 799, 814 (1935), app. dism. 296 U. S. 543 (1935), 297 U. S. 725 (1936), Chief Justice Rugg said (p. 181):

> "The finding of the master that the rules and regulations tend to prevent such distraction of the attention of drivers of automobiles and to promote public safety upon highways is warranted and must be accepted as true even though no direct testimony was introduced that particular accidents were due to inattention of drivers of automobiles caused by the distracting influence of pictures, embellishments and words on signs or billboards. The view taken by the master may have been convincing on this point. Apart from that, it is almost if not quite a matter of common knowledge that such distraction from that cause with accompanying jeopardy to travellers is liable to

occur. Rules and regulations of advertising devices, even to the extent of prohibition, having a reasonable tendency to prevent obstructions to traffic or to facilitate safety of travel, are permissible."

Similarly, in *Brachey* v. *Maupin*, 277 Ky. 467, 126 S. W. 2d 881 (1939), the Court said (p. 476):

"It is our view that the evidence is clear and convincing that the use of plaintiff's sound truck as equipped and used constitutes a hazard to motorists and pedestrians of the city. It is argued for plaintiff that no accidents have resulted during the many years the sound truck has been in operation on the streets. But this is beside the question. It is not a question of whether or not any accidents or injury to person or property have actually occurred, but whether such is likely to result or be produced."

(5)

The argument advanced by the appellants concerning the advertising signs in the Times Square area in no way tends to prove that vehicles bearing advertising signs do not constitute a traffic hazard or that the regulation in question is lacking in reasonable basis. Assuming that the Times Square signs create a greater traffic danger than those on vehicles, it does not follow that the attempt to eliminate the lesser evil is unconstitutional. Simply because the legislative authorities may have decided that the preservation of the unique and picturesque qualities of "The Great White Way" warrants the additional traffic risks in that limited area, does not prevent them from making every effort to minimize other traffic dangers. Moreover, there are countervailing factors which tend to reduce the danger created by the distracting signs in the Times Square area. Motorists in that area are aware of the situation and drive more slowly and exercise greater caution. In addition to the traffic lights, traffic policemen are stationed at every street corner at night when the illuminated signs are turned on. The police also make

unusual efforts to prevent pedestrians from crossing against the traffic lights in and around Times Square.

Vehicles bearing advertising signs are not rendered "wholly unobjectionable" because in a limited area and for reasons peculiar to this area more distracting signs are permitted. Nor are the objectionable features of vehicular advertising lessened by the fact that advertising by aircraft has not been entirely prohibited. Aside from the fact that the existence of one evil does not immunize another from regulation, there are several possible explanations for the failure of the municipal authorities to take more stringent action with regard to aircraft advertising. The introduction of such advertising is comparatively recent. Its use is infrequent. Finally, action may have been delayed by the difficult legal problem of determining the extent to which a municipality may exercise control over the air space above it, particularly when the aircraft takes off and lands outside the limits of the city or state.

It should be noted that the New York City Planning Commission, in a discussion of the need for billboard regulation in 1939, said (Annual Report, p. 42):

> "Billboards are often a positive menace to life and limb, since they distract the attention of motorists and pedestrians on the highways."

In 1940 the Zoning Resolution of the City of New York was amended to bar the erection of signs in residence districts except for small size, non-illuminated signs indicating the practice on the premises of the profession of the occupant and "for sale" and "for rent" signs; and to limit business and advertising signs in business and retail districts. Zoning Resolution § 3(9). (d), § 4(49). Other limitations on the use of signs in New York City are found in New York City Administrative Code, § B26-7.0.

Insofar as the Times Square argument of the appellant involves a claim of denial of equal protection of the laws, it is answered by the cases cited in Point II of this brief, infra, pp. 16-19.

(6)

Throughout the appellants' brief there are references to the Traffic Regulation as a "prohibition" of paid vehicular advertising, coupled with assertions that, while regulation may be permissible, prohibition is invalid. Basically, this contention rests on semantic quibbling. Essentially we are dealing with a *regulation* of vehicular traffic. Motor vehicles are regulated in that they are not permitted to carry advertising on their sides. Only by treating the advertising as something entirely independent of the normal uses of the vehicles on which the advertisements appear can justification be found for labeling the Regulation a prohibition.

In any event, the validity of the Traffic Regulation does not depend upon whether the descriptive label "prohibition" is more appropriate than the label "regulation". The right to exercise the police power is not determined by a mechanical fitting into verbal categories.

It may well be that prohibition is improper where it is clear that regulation will suffice. Such is not the case here. Prohibition of vehicular advertising is necessary to eliminate the evil. Regulation will, at best, merely reduce it. No matter how regulated, the advertising will still tend to attract attention, for that is the very purpose of advertising; and the Regulation is aimed at the elimination of the danger involved in such attraction. If we were dealing with stationary billboards, a regulation which required them to be placed in positions where they could not be seen by pedestrians while crossing the streets or by drivers of motor vehicles might suffice. Obviously, such a regulation of vehicular advertising is impossible.

(7)

Although the appellants' brief never flatly requests this Court to review the state courts' construction of Traffic Regulation § 124, such a review is implictly suggested by

the many statements that the regulation was intended to apply only to vehicles using the streets solely for advertising purposes. For example, the case of *State* v. *Hind*, 143 Nebr. 479, 10 N. W. 2d 258 (1943), dealing with the statutory construction of a somewhat similar law is repeatedly cited.

In the case at bar and in *Fifth Avenue Coach Co. v. City of New York*, 194 N. Y. 19 (1909), however, the New York courts construed the legislation to be applicable to the appellants' trucks and to other vehicles which carry advertising on their sides, regardless of whether this is merely incidental to normal business operation of the vehicles. It is well established that this Court must accept the State's determination of the meaning of the Traffic Regulation. *Price* v. *Illinois*, 238 U. S. 446, 451 (1915); *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 73 (1911); *Sauer* v. *New York*, 206 U. S. 536, 546 (1907); *Morley* v. *Lake Shore Railway Co.*, 146 U. S. 162, 167 (1892). Cf. *Owensboro Water Works Co.* v. *Owensboro*, 200 U. S. 38, 46-47 (1906); *Wilson* v. *Eureka City*, 173 U. S. 32, 35 (1899).

Equally inappropriate is the appellants' contention that the regulation has no reasonable relation to the powers delegated to the Police Commissioner. The extent to which the State has delegated this police power to a municipality or municipal authorities is a question for the state courts and has been decided by them. That the power to adopt such regulations may be delegated to the Police Commissioner is well settled. *Cherubino* v. *Meenan*, 253 N. Y. 462 (1930); *Lieberman* v. *Van De Carr*, 199 U. S. 552, 560-562 (1905); *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 611-612 (1937).

POINT II

An exemption for business notices relating to the business of the vehicle owner in a regulation barring advertising signs on vehicles, does not involve a denial of the equal protection of the laws. It constitutes a valid classification resting on a reasonable basis.

(1)

The contention that the traffic regulation involved violates the equal protection of the laws clause because it contains an exception for business notices of the owner on his vehicles, is without merit.

The arguments advanced concerning the inapplicability of the precedent of *Fifth Avenue Coach Co.* v. *City of New York*, 221 U. S. 467 (1911), as a result of the passage of time and changes in conditions, even if meritorious as to the other aspects of the case, have no application to the equal protection of the laws question. Neither the passage of time nor the changes in conditions have altered the basis for the classification or its reasonableness. In the *Fifth Avenue Coach* case the Court said (pp. 483-484):

> "The third contention is that the ordinance denies plaintiff the equal protection of the laws, and to support the contention it is urged that 'no advertising wagons are allowed in the streets, but "ordinary business wagons" when "engaged in the usual business or work of the owner, and not used merely or mainly for advertising," are permitted to exhibit "business notices."' It is argued that the ordinance 'thus creates a favored sub-class of vehicles which are permitted to display advertisements.' In view of the power of the State and the city acting with the authority of the State, to classify the objects of legislation, we will not discuss the contention. The distinction between business wagons and those used for advertising purposes has a proper relation to the purpose of the ordinance and is not an illegal discrimination."

This is as true today as it was in 1911.

The presumption of constitutionality applies where legislation or a regulation is attacked on the ground that it denies the equal protection of the laws. "A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Casualty Insurance Co.* v. *Brownell*, 294 U. S. 580, 584 (1935).

The question is simply whether there is a reasonable basis for the classification. If there is, it matters not that other activities which also constitute evils are unaffected by the regulation or exempted from its application. *Woods* v. *Miller Co.*, 333 U. S. 138, 145 (1948); *United States* v. *Carolene Products Co.*, 304 U. S. 144 (1938); *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144 (1914).

In *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160 (1912), Mr. Justice HOLMES speaking for the Court said that a legislature may

> "direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

Classifications which exempt an owner engaged in his own business have generally been sustained. In the analogous situation of restrictions on the use of billboards, exemptions for billboards or signs referring to the business conducted on the property upon which they stand have been upheld. *General Outdoor Advertising Co.* v. *Dept. of Public Works*, 289 Mass. 149, 211-212, 193 N. E. 799, 828 (1935), app. dism. 296 U. S. 543 (1935), 297 U. S. 725 (1936); *Murphy* v. *Town of Westport*, 131 Conn. 292, 40 A. 2d 177 (1944).

Similarly a distinction may be drawn between vehicles of carriers for hire and vehicles used in the ordinary course of the business of their owners. In *Bradley* v.

Public Utility Commissioners of Ohio, 289 U. S. 92 (1933), Mr. Justice BRANDEIS said (p. 97):

> "In dealing with the problem of safety of the highways, as in other problems of motor transportation, the State may adopt measures which favor vehicles used solely in the business of their owners, as distinguished from those which are operated for hire by carriers who use the highways as their place of business."

See also: *Packard* v. *Banton*, 264 U. S. 140, 144 (1924); *Dixie Ohio Express Co.* v. *State Revenue Commission*, 306 U. S. 72, 78-79 (1939).

There are a number of reasonable grounds for distinguishing between vehicles carrying advertising for others and vehicles carrying advertising of the owner. In actual practice owners of trucks rarely place advertising of their own business on the sides of the vehicles. An overwhelming majority of truck owners merely place their name, address and a brief statement of the nature of their business on the sides of their trucks. Moreover, advertisements for businesses other than that of the owner of the vehicle are almost invariably placed on vehicles which are constantly on the streets, such as appellants' trucks.

The appellants ask this Court "to take judicial notice that displays advertising the business of truck owners (i.e. 'business notices') are just as large, bold and lurid as any commercial advertising." As a matter of fact, the number of truck owners who advertise their own business on the sides of their trucks (except to the extent of merely naming the nature of their business) are few, and only a small percentage of this limited group use large, bold and lurid signs. In the courts below the appellants apparently made a studied effort to cite as many examples of such advertising as they could discover and, nevertheless, were able to give only a handful of examples. Contrast this with the 1900 trucks of the appellants in New York City or the numerous busses of the Fifth Avenue Coach Company, and it indicates why the distinction was made.

(3)

Thus far we have discussed the exemption as though it permitted owners to advertise their own business, but there is serious doubt whether the exemption for vehicles engaged in the usual business of the owner relates to advertising of the kind carried by the trucks of the Railway Express Agency. The exemption merely permits the use of "business notices" of the owner. This phrase has never been judicially construed by the New York courts. It may well be held that a "business notice" is confined to the name of the owner, his address, and the nature of his business. That is all that is to be found on most business delivery vehicles in New York City. Undoubtedly there are some which have signs on their sides advertising the business of the owner in a manner akin to that in which the Railway Express Agency advertises the business of others. Whether such advertisements of the owner constitute "business notices" has not yet been determined.

(4)

The appellants' reliance on *Smith* v. *Cahoon*, 283 U. S. 553 (1931) may be answered by a reference to several of the cases in which this Court has distinguished that case, cases involving classifications far more analogous to the classification involved herein. *Continental Baking Co.* v. *Woodring*, 286 U. S. 352, 371-373 (1932); *Hicklin* v. *Coney*, 290 U. S. 169, 173-176 (1933); *Aero Transit Co.* v. *Georgia Public Service Comm'n*, 295 U. S. 285, 292 (1935).

POINT III

A regulation barring the use of advertising signs on all vehicles in New York City does not violate the commerce clause merely because it is applicable to vehicles engaged in interstate commerce as well as to all other vehicles.

(1)

The appellants assert that the regulation of the use of advertising signs on the sides of vehicles using the streets of New York City is a prohibition which, in so far as it is applicable to vehicles in interstate commerce, constitutes an invalid burden on such commerce. It is well established, however, that in the absence of a direct conflict with federal legislation a State (or a city) may adopt legislation designed to promote safety upon its streets and highways which is applicable alike to interstate and local vehicles. In *Morris* v. *Duby*, 274 U. S. 135 (1927), Chief Justice TAFT, speaking for the Court, said (p. 143):

> "In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens."

In *South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177 (1938), Mr. Justice, later Chief Justice, STONE said (p. 187):

> "But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate.

> Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulations of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state for its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways."

He went on to say (pp. 189-190):

> "In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.
>
> "Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."

See also: *Sproles* v. *Binford*, 286 U. S. 374, 389-390 (1932); *California* v. *Thompson*, 313 U. S. 109, 115-116 (1941).

Several of the cases cited and quoted above involved restrictions upon the weight and width of vehicles permitted on the state highways, restrictions involving a far greater burden in interstate commerce than the regulation relating to advertising signs.

The enactment of the Federal Motor Carrier Act does not curtail the power of the states to adopt such legislation except in so far as the state laws are in direct conflict with the federal law. This is so even with regard to carriers which come under the federal act. *Maurer* v. *Hamilton*, 309 U. S. 598 (1940); *Thompson* v. *McDonald*, 95 F. 2d 937 (5th Circ., 1938), affd. 305 U. S. 263 (1938). Obviously this is so in the case at bar where the appellant apparently is not subject to the Federal Motor Carrier Act.

Even where the Motor Carrier Act grants the Interstate Commerce Commission a specific power to adopt a regulation, a state may act until the federal regulation is actually adopted and effective. Thus in *Welch Company* v. *New Hampshire*, 306 U. S. 79 (1939) it was held that, despite the statutory grant of power to the Interstate Commerce Commission to adopt requirements with respect to "maximum hours of service or employment" of motor carrier employees, state legislation fixing maximum hours was valid and applicable to an interstate carrier until an Interstate Commerce Commission regulation dealing with hours of service was adopted and took effect.

The basic principle of the *Welch* case has been applied to many other fields of federal regulation. We cite but a few examples: *Terminal Railroad Association* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1 (1943); *Kelly* v. *Washington*, 302 U. S. 1 (1937); *Savage* v. *Jones*, 225 U. S. 501 (1912).

(2)

The appellants rely heavily on *Adams Express Co.* v. *New York*, 232 U. S. 14 (1914). That case involved license fees imposed on an interstate carrier. The fees had no

relation to the cost to the municipality of local supervision or to the extent of the carrier's intrastate business. The Court pointed out that the license fees could not be considered as a regulation in the interest of safety in street traffic. It was simply a tax on interstate commerce, and, therefore, invalid.

Nor is *Morgan* v. *Virginia*, 328 U. S. 373 (1946) determinative of the case at bar. The legislation involved in that case was not designed to promote traffic safety. It sought to extend racial segregation to interstate vehicles. This Court pointed out that validity must be determined "as a matter of balance between the exercise of the local police power and the need for national uniformity in the regulation for interstate travel" (p. 386). On the basis of that test the Traffic Regulation should be sustained. A glance at any of the statistics dealing with traffic casualties reveals the compelling necessity for action aimed at reducing traffic hazards. On the other hand, it is difficult to discover any great need for national uniformity in advertising or vehicular advertising. Neither national travel nor interstate transportation of goods is affected by the local regulation. It is only advertising having no relationship to such travel or transportation that is affected.

It is noteworthy that in the case of *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945), a railroad case upon which the appellants place much stress, this Court emphasized the difference between regulation of railroads and regulation of traffic on the highways, stating that in the latter field the states have far more extensive control (325 U. S. at p. 783).

(3)

Assertions are made that the burden imposed on interstate commerce by the New York City regulation is an extreme one. So far as the appellants are concerned precisely the opposite is true. A requirement that advertising signs be removed from the sides of vehicles moving in

or through New York City is far from being as onerous as one which denies the highways of the state to interstate vehicles which exceed state imposed weight or width limitations.

Moreover, the Railway Express Agency vehicles affected are not vehicles which move through various states. Technically, it is true, they are engaged in interstate commerce. Essentially, however, their course of travel is confined to New York. Testimony on behalf of the appellants established that there are 1,900 trucks of the Railway Express Agency which are used in New York City (R. 52, 54). These trucks do not leave New York City except to go to terminals in New Jersey (R. 54). These terminals are located at rail heads in Communipaw, Erie, Lackawanna, and West Shore on the New Jersey shore opposite New York City (R. 48).

Thus, while the articles carried by the trucks come from or go to all parts of the country, the trucks themselves travel only in New York City and across the Hudson River to terminals on the New Jersey shore. Therefore, the argument that different states and localities may impose varying requirements relating to vehicular advertising signs and thereby burden interstate commerce is scarcely available in the case at bar. In any event, a similar argument was advanced in the cases involving restrictions on the weight and width of trucks, and it was rejected by this Court.

(4)

Nor is there any need to deal at length with the view that somehow the appellants' contentions based on the commerce clause are strengthened by the fact that the contracts for the carriage of goods involve interstate commerce. In *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), this Court said (p. 253):

> "That the mere formation of a contract between persons in different states is not within the protection of

the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question."

See also: *Packer Corporation* v. *Utah*, 285 U. S. 105 (1932). Cf. *Stephenson* v. *Binford*, 287 U. S. 251, 274 (1932).

CONCLUSION

The judgment should be affirmed.

New York, N. Y., November 26, 1948.

Respectfully submitted,

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